CHUNG LEE YING

v.

THE DIRECTOR OF THE FORESTRY DEPARTMENT SABAH & ANOR

HIGH COURT SABAH & SARAWAK, SANDAKAN
HAMID SULTAN ABU BACKER JC
[SUIT NO: 22-03-2004]
25 SEPTEMBER 2008

TRADE AND INDUSTRY: *Forestry - Wrongful seizure of tractors - Damages - Claim for - Whether seizures made by persons envisaged by the Forest Enactment 1968 (FE 1968) - Whether defendants could rely on statutory defences as provided for in s. 37A or 40 and 41 FE 1968 - Issue of limitation - Whether arose - Whether defendants liable for damages*

The plaintiff's claim herein was for damages against the defendants for wrongful seizure of two of their tractors, inclusive of declarations, etc. It was the plaintiff's case that two of their tractors were subcontracted to a firm, Wawasan Kinabatangan, to carry out timber hauling works. On 16 October 2001, the said tractors were seized by the defendants upon suspicion of having committed an offence under the Forest Enactment 1968 (FE 1968). On 7 May 2003, the tractors were ordered by the magistrate's court to be released unconditionally to the plaintiff. In consequence, it was the plaintiff's stand that they were entitled to damages from 16 January 2001 to 7 May 2003, and if liability was established, the matter was to be referred to the deputy registrar for assessment of damages. The defendants, however, submitted that they had lawfully seized and detained the tractors pursuant to s. 36(1)(d)(ii) of FE 1968. The defendants also argued that pursuant to s. 37A, 40 and 41 FE 1968, the plaintiff was not entitled to damages and that the plaintiff's claim was time barred pursuant to item 16 of Part 1 (Schedule) of the Limitation Ordinance Sabah (LOS). The issues that arose herein were (i) whether the seizure was done according to law; (ii) whether the defendants were entitled to the statutory defences and (iii) whether the claim was time barred.

Held (allowing the plaintiff's claim in part):

(1) In this case, the so called s. 36(1)(d)(ii) seizures were not made by the persons envisaged by the FE 1968. The seizure on 16 January 2001 was made by Rakyat Berjaya Sdn Bhd and the army. As the seizure was not made as provided under the said enactment, there was no seizure at all on that date. In consequence, the defendants could not rely on the statutory defences as provided

for in s. 37A or 40 and 41 FE 1968. On the issue of limitation, item 16 of LOS did not apply as it was not a seizure according to due process of law. Items 37 and 38 LOS would apply and the limitation period was three years, hence the plaintiff had filed the action within time. Further, it was not necessary to grant a declaration in the terms sought by the plaintiff, save to say that it was this court's finding on the facts of this case that the defendants were liable for wrongful detention of the said tractors and in consequence were liable for damages. (para 15)

[Order accordingly.]

Case(s) referred to:

Abdul Manaf Ahmad v. Mohd Kamil Datuk Hj Mohd Kassim [2004] 1 LNS 320 HC ***(refd)***

Chic Fashions (West Wales) Ltd v. Jones [1968] 2 WLR 201 ***(refd)***

Mahmood v. Government of Malaysia & Anor [1974] 1 MLJ 103 ***(refd)***

Masa Nangkai & Ors v. Sgt Edwin Nacha & Anor [2004] 1 LNS 495 HC ***(refd)***

Ramly & Ors v. Jaffar [1967] 1 LNS 136 FC ***(refd)***

Shaaban & Ors v. Chong Fook Kam & Anor [1969] 1 LNS 70 PC ***(refd)***

Sivasubramanian v. Chong Cheong Wah & Anor [1972] 1 LNS 138 HC ***(refd)***

Syarikat Raspand v. Government of the State of Sabah [2005] 7 CLJ 179 HC ***(refd)***

Tan Kay Teck & Anor v. The Attorney General [1957] 1 LNS 84 HC ***(refd)***

Legislation referred to:

Forest Enactment 1968 (Sabah), ss. 2, 12, 23, 36(1)(d)(ii), 37A, 37(2), (6), 40, 41

For the plaintiff - Gabriel Ho; M/s Gabriel Ho & Co Advocates
For the defendants - Julita Gumpil; State Counsel

Reported by Suhainah Wahiduddin

JUDGMENT

Hamid Sultan Abu Backer JC:

[1] This is my judgment in respect of the plaintiff's claim for damages against the defendants for wrongful seizure of two of their tractors, inclusive of declarations, etc.

[2] At the commencement of the hearing, parties have agreed that the case can be heard by way of: (i) witness statement for examination in chief; (ii) preliminary cross-examination witness statement, with full liberty to further cross-examine orally (for purposes of cross-examination); (iii) preliminary re-examination statement with full liberty to further re-examination if there is further oral examination. The court

is extremely grateful to the parties for agreeing to such a mode as the preliminary cross-examination witness statement will save much of the court's time to deal with peripheral matters and for all practical purposes, preliminary cross-examination witness statement will stand as interrogatories and answers thereto only, as the right of oral cross-examination to the litigant is preserved during the whole trial.

Brief Facts (Plaintiff's Version)

[3] The plaintiff says: (i) two of their tractors were subcontracted to a firm called Wawasan Kinabatangan to carry out timber hauling works; (ii) on 16 January 2001, the said tractors were seized by the defendants or their servants or agents upon suspicion of having committed an offence under the Forest Enactment 1968 (FE 1968); (iii) the defendants only referred the matter of seizure of the said tractors to the magistrate court at Sandakan sometime in October 2001; (iv) on 7 May 2003, the tractors were ordered by the magistrate's court to be released unconditionally to the plaintiff. In consequence they are entitled to damages from 16 January 2001 to 7 May 2003, and if liability is established the matter is to be referred to deputy registrar for assessment of damages.

Defendants' Version

[4] The defendants say: (i) they have lawfully seized and detained the tractors pursuant to s. 36(1)(d)(ii) of FE 1968; (ii) the notice of seizure pursuant to s. 37(2) FE1968 was duly published in the local newspaper on 14 April 2001; (iii) police report was lodged on 8 May 2001; (iv) upon the instruction of deputy public prosecutor's chambers the matter was referred to magistrate's court on 11 October 2001. Further, the defendants say: (i) the said tractors were seized and detained for investigation as the same were reasonably suspected of having been used to commit a forest offence under FE 1968; (ii) pursuant to ss. 37A, 40 and 41 FE 1968, the plaintiff is not entitled to damages; (iii) in addition the plaintiff claim is time barred pursuant to item 16 of Part 1 (Schedule) of the Limitation Ordinance Sabah (LOS).

[5] The statement of agreement facts *inter alia* reads as follows:

> (a) in January 2001, a firm by the name of Wawasan Kinabatangan was carrying out timber hauling works in respect of timber logs tendered by the latter at Sg. Naping/Tangkong, Kinabatangan, Sandakan; (b) the said tractors were seized and detained pursuant to a complaint made by the Rakyat Berjaya Sdn Bhd (a wholly owned Subsidiary of Innoprised Corporation Sdn Bhd) and under the Forest Enactment 1968; (c) a special operation known as "Forest storm" was conducted by Rakyat Berjaya Sdn Bhd and

the army at T8, Sg Naping, Tangkong, Kuamut Forest Reserved (hereinafter referred to as "the said area") on 16 January 2001. During the said operation, the operation team found 57 suspected illegal logs in the said area The operation team also found three tractors on the said area. Two of the tractors found by the operation team are owned by the plaintiff (hereinafter referred to as "the said tractors"). A police report was lodged at the Kota Kinabatangan Police Station by one Mait Gutuk on 21 January 2001; (d) upon being alerted of the 57 suspected illegal logs, the 1st defendant on 31 January 2001 conducted investigation in the said area but the Rakyat Berjaya Sdn Bhd's worker who was assigned to guard the said area did not know the exact location of the 57 suspected illegal logs and the 124 logs purchased by Syarikat Wawasan Kinabatangan. (hereinafter referred to as "the tender logs"). However three tractors were found in the said area during this investigation; (e) Syarikat. Wawasan Kinabatangan is a company who had purchased the 124 logs (the tender logs) auctioned off by Yayasan Sabah. A removal pass dated 2 January 2001 was issued to the company to enable them to remove the tender logs from the said area; (f) further investigation was conducted by the 1st defendant together with the Rakyat Berjaya Sdn Bhd on 11 March 2001. During this investigation 166 logs were found in the said area which was more than the 124 tender logs 109 of the logs found belonging to Syarikat Wawasan Kinabatangan ie, tender logs, whilst the remaining 57 logs were found to be newly felled logs from the trees in the said area ie, non tender logs. Further, during this investigation it was found out that 44 of the logs were located at the "Pangkalan" near to the 109 tender logs while the remaining of 13 logs was located in the forest. Pursuant to this finding, the 1st defendant seized all the 166 logs and the three tractors found in the said area including the said tractors; (g) the Notice of Seizure pursuant to s. 37(2) Forest Enactment 1968 was duly published in the local newspaper on 10 April 2001. Subsequently, police report was lodged on the 8 May 2001 at Kota Kinabatangan Police Station by one Saiful Majid; (h) the detention of the logs and the tractors were referred to the Deputy Public Prosecutor's Chambers and the 1st defendant was advised by the Deputy Public Prosecutor's Chambers to refer the matter to the court pursuant to s. 37(6) of the Forest Enactment 1968. The 1st defendant referred the seizure to the Magistrate court on 11 October 2001 for enquiry. The case was numbered under suit number Miscellaneous Application 121 of 2001; (i) the plaintiff had filed a suit against the 1st defendant under suit number miscellaneous application 17 of 2002 on 27 February 2002 for temporary release of the said tractors. The case was heard at the magistrate court on 6 March 2002 and the honorable court ordered that the said tractors be temporary released to the plaintiff pending the inquiry of the case subject to

certain conditions imposed therein. One of the conditions in the Order is that, "Traktor dan Bulldozer hendaklah dilepaskan setelah kerja-kerja survey slap dijalankan oleh Jabatan Tanab dan Ukur" The survey report prepared by the Jabatan Tanah dan Ukur was submitted to the 1st defendant on 19 June 2002. Upon receiving the said report the 1st defendant instructed the Forestry Officer Kota Kinabatangan on 25 June 2002 to take necessary action for the temporary release of the said tractors. The said tractors were released and taken possession of by the plaintiff on 11 September 2002 subject to the conditions in the court order dated 6 March 2002; (j) the case under suit number Miscellaneous Application 121 of 2001 for inquiry was struck out at the Magistrate Court Sandakan on 7 May 2003. The matter was referred to the magistrate court since 11 October 2001.

Preliminaries

[6] Two witnesses gave evidence for the plaintiff and three witnesses for the defendants. Most of the facts in this case are not disputed. The real issue is whether the seizure was done according to law and whether the defendants are entitled to the statutory defences; and in addition, whether the claim is time barred.

Defendants' Argument

[7] The defendants say: the tractor was lawfully seized pursuant to s. 36(1)(d)(ii) which reads as follows:

36 (1) Any forest officer or police officer:

(a) may require the production by any person of any licence or other authority for any act done or committed by such person or his servant or agents for which such licence or authority is required by or under this Enactment or the rules;

(b) may require any person in possession of any forest produce to give an account of the manner in which, such person came into such possession, and if such person fails to account for such possession to the satisfaction of the officer, the latter may seize and detain such produce;

(c) if he has reasonable cause for believing that any person has committed a forest offence, and

(i) that such person is unlikely to attend the Court in answer to any summons addressed to him or

(ii) upon being requested to give his name address, such person fails to do so or gives name and address which such officer believes to be false,

may arrest such person without warrant;

A (d) may seize and detain:

(i) any forest produce in respect of which there is reason to believe that a forest offence has been committed;

(ii) any tool, instrument, boat, conveyance, machinery, B equipment or other thing whatsoever used or reasonably suspected of having been used in the commission of a forest offence, ...

and rely on the case of *Sivasubramanian v. Chong Cheong Wah & Anor* [1972] 1 LNS 138 where the learned judge in determining whether the C seizure was lawful opined:

> The question is whether he has the power to act under the law. If he has, then I think if would be unnecessary to enquire whether he directed his mind to the particular law at the time of exercising that power.

D

[8] The defendants further say, what amounts to reasonably suspicious or probably suspicious have been decided in various cases namely:

(a) In the case of *Ramly & Ors v. Jaffar* [1967] 1 LNS 136 where the Federal Court held that: E

> the question whether there was reasonable and probable cause must be determined objectively on the evidence before the Court

(b) In *Mahmood v. Government of Malaysia & Anor* [1974] 1 MLJ 103 F it was held that the question whether there existed sufficient grounds to raise such a reasonable suspicion is a question for the court to decide.

and rely also on the following cases: (i) *Shaaban & Ors v. Chong Fook* G *Kam & Anor* [1969] 1 LNS 170; (ii) *Masa Nangkai & ors v. Sgt. Edwin Nacha & Anor* [2004] 1 LNS 495; (iii) *Tan Kay Teck & Anor v. The Attorney General* [1957] 1 LNS 84; (iv) *Chic Fashions (West Wales) Ltd v. Jones* [1968] 2 WLR 201.

[9] In reliance of the above cases, the defendants say: (i) the 1st H defendant had acted within the provision s. 36(1)(d)(ii) of the Forest Enactment 1968; (ii) the 1st defendant had proven reasonable suspicion that the said tractors were being used in the commission of, a forest offence; (iii) there is no requirement to establish *prima facie* proof of the offence before the said tractors could be seized or detained; (iv) there I were sufficient facts, when viewed collectively, for the 1st defendant to have acted on reasonable suspicion and to have seized and/or detained

the said tractors and therefore the seizure and/or detention and/or trespass of the said tractors were lawful and in accordance with the Forest Enactment 1968.

[10] On the issue of limitation the defendants say that:

Section 3 of the Limitation Ordinance (Sabah Cap. 72) states:

3. Subject to sections 4 to 24, every suit instituted after the period of limitation prescribed therefore by the Schedule shall be dismissed:

Provided that limitation has been set up as a defence.

Item 16 of the Schedule states:

Description of suit For	Period of Limitation	Time from which period begins to run
16. For compensation for wrongful seizure of movable property under legal process	One year	The date of the seizure

and say:

(a) Say under item 16, the limitation period for compensation for wrongful seizure was 1 year from the date of the seizure; (b) the plaintiff's action is time barred because the notice of seizure was published on the 10-04-2001. If the date of seizure took place on the - 16.01.2001 (as alleged by the Plaintiff) the day when the first operation was conducted it is also out of time because the plaintiff's claim was only filed on the 15-01-2004.

[11] Also defendants rely on the case of *Abdul Manaf Ahmad v. Mohd. Kamil Datuk Hj. Mohd. Kassim* [2004] 1 LNS 320 where Steve Shim Lip Kiong J (as he then was) opined:

Now it has been held that when the defence of limitation is raised, the burden of pleading and proving that the action was brought within the limitation period shifts to the plaintiff.

[12] On the issue of statutory defence, the defendants say s. 37A FE 1968 does not permit the plaintiff to claim damages. Section 37A states:

10.1 S. 37A of the Forest Enactment 1968 provides;

No person shall in proceedings before any court in respect of the seizure of anything seized in the exercise or purported exercise of the powers conferred under this Enactment be entitled to the costs of such

A proceedings or to any damages or other relief other than an order for the return of such thing or the payment of their value unless the seizure was made without reasonable or probable cause.

In the case of *Syarikat Raspand v. Government of The State of Sabah* [2005] 7 CLJ 179 it was held that s. 37A of the Forest Enactment B would apply only if the logs originated from Sabah and the Forest Department had reason to suspect the commission of forest offence in relation to those logs and that the Forest Department did not have the power or jurisdiction against the impugned logs. The Judge held further that the important phrase in s. 37A of the Forest Enactment is "... in C the exercise or purported exercise of the powers conferred under this Enactment ..." From the start to end the Forestry Department did not have the power or jurisdiction. Hence, the Enactment had no application to the facts of this case.

D **[13]** Further the defendants rely on s. 40 FE 1968 which states:

Section 40 of the Forest Enactment 1968 provides;

... the Government, forest officers, police officers and members of the armed forces shall not be held responsible for any loss or damage which may occur in respect of any forest produce or other property E while detained by, or other wise in the custody of, any such officer under the Enactment or the rules, or in respect of any timber taken into possession under section 26 of the Enactment, unless such loss or damage arose out of a malicious, fraudulent or grossly negligent act of any such officer.

F **Plaintiff's Argument**

[14] The plaintiff says: (i) the action is also in respect of wrongful detention and/or trespass of the two tractors; (ii) the relevant period is stated in items 37 and 38 of the LOS Sabah which provides for a G limitation period of three years and in consequence the action is not time barred; (iii) it is not disputed that the 'said area', in which the plaintiff's two tractors were seized and detained were under the Yayasan Sabah Timber concession and Rakyat Berjaya Sdn Bhd was involved in the operation conducted on 16 January 2001 together with the armed forces following a complaint by Rakyat Berjaya Sdn Bhd; (iv) these tractors H however since 16 January 2001 had already been seized and detained by the personnel of Rakyat Berjaya Sdn Bhd and under the Forest Enactment (under agreed fact) when clearly they have no power and jurisdiction to do so, and only later on 16 April 2001, did the 1st defendant cause the two tractors to be seized and detained; (v) s. 23 of I the Forest Enactment 1968 provides for offences under the Enactment:

23. (1) Unless expressly authorised by or under the provisions of this Enactment, any person who:

(a) girdles, marks, loops, taps or injures by fire, or otherwise any forest produce on any State land; of

(b) removes any forest produce found on any alienated land beyond the boundaries of that land,

shall be guilty of an offence and on Conviction shall be liable to a fine not exceeding fifty thousand ringgit or to imprisonment for a term not exceeding five years or to both such fine and imprisonment.

(2) Unless expressly authorized by or under the provisions of this Enactment, any person who cuts, collects, converts, fells or removes any forest produce on any State land shall be guilty of an offence and on conviction shall be punished with a fine not exceeding five hundred thousand ringgit and to imprisonment for a term which shall not be less than one year but shall not exceed twenty years.

(3) Any person convicted of an offence under this section may, in addition to any penalty imposed on the conviction, be ordered to pay, in respect of any forest produce unlawfully taken, to the Government:

(a) a sum not exceeding ten times the royalty, fee and other sum due;

(b) a sum not exceeding ten times the value of such forest produce; and

(c) any other charges payable,

And such sum ordered to be so paid shall be recoverable as if it were a fine so imposed.

(vi) in s. 2 of the definition section of the Forest Enactment 1968 "State land" means all land in the State other than a Forest Reserve or alienated land; whereas "Forest Reserve" means a Forest Reserve declared as such under s. 12 of this Enactment; (vii) the Forest Enactment has no application to the facts and circumstances of the present case as there was no forest offence of any kind as understood by s. 23 of the Forest Enactments 1968 having been committed. The forest officers DW1 and DW2 all knew that the said area was under the Yayasan Sabah concession area of which all proprietary rights to the timber was vested in Innoprise Corporation Sdn Bhd and/or Rakyat Berjaya Sdn Bhd (until the concession ceases), compounded by the fact that there was no prosecution whatsoever for any forest offence as against Wawasan Kinabatangan and/or in respect of the two tractors.

A This is further compounded by the fact that a police report was lodged by DW3 to investigate the case; (viii) furthermore, as in the case of *Syarikat Raspand v. Government of the State of Sabah* [2005] 7 CLJ 179, in the defendants' list and bundle of authorities, no report on what sort of investigation had been done by the Forestry Department over the B matter was ever mentioned or brought to the fore to show what offence or offences, if any, had been committed by the owner of the two tractors in the period since 16 January 2001 till 16 April 2001, when the 1st defendant decided to cause the said 2 tractors to be seized and detained. DW1 testified in cross-examination that subsequent to his C inspection on 11 March 2001, he also got in touch with the in-house legal officer attached to the Forestry Department, namely Mr. Bernard Daunting; (ix) viewed against the facts and circumstances of the case and the Forest Enactment, no reasons were given as to why it was necessary or legitimate for the 1st defendant to cause the tractors to be seized and detained from 16 April 2001 (as opposed to from 16 January D 2001) onwards, when they have no such power to do so as no forest offence as understood by s. 23 of the Forest Enactment was committed. This would constitute gross negligence if not total recklessness on the part of the officers concerned, and s. 40 of the Forest Enactment has no application to the present case.

E

[15] I have heard the evidence, read the documents and submission of the parties in detail. I take the view the plaintiff's claim must be allowed partly. My reasons are as follows:

F (i) In this case there is no dispute that the so called s. 36(1)(d)(ii) seizures were not made by the persons envisaged by the FE 1968. In fact, the seizure on 16 January 2001 was made by Rakyat Berjaya Sdn Bhd and the army. As the seizure was not made as provided under the said enactment, there was no seizure at all on that date. In consequence, the defendants cannot rely on the G statutory defences as provided for in 37A or 40 and 41. Further, the defendants' subsequent argument before the decision and producing the Government gazette to show the army is empowered to seize, carries little weight as no evidence was led to show the authorized persons in the army as stated in the gazette did the H seizure. In addition, such mode of adducing evidence is contrary to rules of procedure and evidence and ought not to be entertained.

(ii) The defendants' argument that notice of seizure was published on 10 April 2001 was bad in law in that there were no seizures but the defendants had detained the two tractors for which they are I liable for damages as the seizure was not lawful.

(iii) On the issue of limitation, I take the view item 16 of LOS does not apply as it was not a seizure according to due process of law. In this case I agree with the submission of the plaintiff that items 37 and 38 LOS will apply and the limitation period is three years and that the plaintiff has filed the action within time.

(iv) I do not think it is necessary to grant a declaration in the terms sought by the plaintiff, save to say that it is my finding on the facts of this case that the defendants are liable for wrongful detention of the said tractors and in consequence are liable for damages.

[16] As parties have agreed that the assessment of damages can be before the deputy registrar, the matter may be referred to the deputy registrar if the issue of damages cannot be amicably settled by the parties. Further, the defendants are to pay the costs of the plaintiff. The getting up fees shall not exceed RM30,000. If costs cannot be agreed, the plaintiff is at liberty to tax the costs. The sum for damages to carry interest as prayed in the statement of claim.

[17] I hereby order so.